In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1629

ROSS KOTAKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a two-count indictment filed in the United States District Court for the Northern District of Indiana, petitioner was charged with knowingly transporting one Marian Chadwick from Gary, Indiana, to Louisville, Kentucky, for purposes of prostitution on January 7, 1968 (count 1), and with transporting the same woman from Louisville back to Gary for the same unlawful purpose on January 12, 1968 (count 2), in violation of the Mann Act, 18 U.S.C. 2421. After a jury trial, petitioner was acquitted on count 1 and convicted on count 2. He was sentenced to two years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed (Pet. App. A).

425-976—71

Petitioner argues here that he is entitled to acquittal as a matter of law (Pet. 20–30). He asserts that the count 2 transportation back from Louisville to Gary must be deemed merely a return journey, and that the jury's acquittal on count 1 bars his conviction on count 2 under *Mortensen* v. *United States,* 322 U.S. 369. The facts of this case (see Pet. App. 2–6), however, distinguish it from *Mortensen.* Under the evidence the jury could infer that Miss Chadwick did not voluntarily travel with petitioner, but rather was compelled to do so. Thus, even if petitioner made the count 1 trip without the requisite unlawful purpose, the return (count 2) trip was separate. The evidence indicates that petitioner returned Miss Chadwick to Gary, not simply to bring her home, but because he intended to have her available to work as a prostitute for him there—the statutorily proscribed purpose. This was not an innocent vacation trip, as in *Mortensen.*

Petitioner further claims that his acquittal on count 1 rendered insufficient the proof of his guilt under count 2 (Pet. 31–35). But in this case the indictment charged two different offenses as to which the evidence differed. Thus the acquittal on count 1 did not, as petitioner contends, involve facts essential to the count 2 conviction. Moreover, even if the verdicts here are inconsistent, the count 2 conviction should be sustained where, as in this case, sufficient evidence supports it; the inconsistency is deemed to result from the exercise by the jury of its historic power of lenity. *Dunn* v. *United States,* 284 U.S.

390;[1] *United States* v. *Carbone,* 378 F. 2d 420, 422–423 (C.A. 2), certiorari denied, 389 U.S. 914; see also *United States* v. *Dotterweich,* 320 U.S. 277, 279.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

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[1] Petitioner quotes the *Dunn* opinion to the opposite effect (Pet. 33–34), representing that the quotation is from "Justice Holmes speaking for the Court." In fact the quotations are from the dissenting opinion of Mr. Justice Butler. Mr. Justice Holmes wrote the majority opinion, which holds that an inconsistent jury verdict does not require acquittal.

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